| | |
|---|---|
| **In the Matter of an Arbitration Between** | |
| | **AWARD & OPINION** |
| **California Correctional Peace Officers Association** | |
| **and** | **DPA No. 06-06-0399** |
| **California Department of Corrections and Rehabilitation** | **CDCR No. 06-N-78-066** |
| | **CCPOA No. 19101** |
| **Grievance: Article15.01(A)** | **NB2752** |

# Before
**Norman Brand**

# Appearances

For California Correctional Peace Officers Association
Carroll, Burdick & McDonough
by **Ronald Yank, Esq.** and
**Daniel M. Lindsay, Supervising Legal Counsel, CCPOA**

For California Department of Corrections and Rehabilitation
State of California, Department of Personnel Administration, Legal Division
**by Christopher Thomas, Legal Counsel**
**Kevin Geckeler, Legal Counsel**

**September 1, 2007**

## Background

On September 27, 2006, the California Correctional Peace Officers Association ("CCPOA") filed a fourth level grievance with the Department of Personnel Administration ("DPA" or "State"). When DPA denied the grievance, CCPOA demanded arbitration. I held hearings on April 10, June 6 and 11, and August 13, 2007, in Sacramento, CA. Both parties were present at the hearings. Each had a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither party objected to the conduct of the hearing. A stenographic record of the proceeding was made. At the close of the evidence, the parties made concluding arguments. I received the transcript on August 29, 2007, at which time I declared the hearing closed.

## Issue

1. Does the Arbitrator have the authority to interpret and apply the provisions of the Ralph C. Dills Act, Government Code sections 3517.61, 3517.7, and 3517.8?

2. Do the provisions of the Dills Act serve to prevent this arbitration from proceeding, since the Legislature did not appropriate any monies for a wage increase and/or new benefits for Unit 6 members during the 2006-07 fiscal year?

3. Are all of CCPOA's claims for economic compensation ripe for adjudication?

4. With respect to the following economic items, did the California Department of Corrections and Rehabilitation violate sections 15.01 and/or 27.01 (including the 2004 addendum) of the expired Bargaining Unit 6 Memorandum of Understanding (MOU) (2001-06), when it failed to provide Unit 6 members with the following items of compensation:

    - a 3.5% salary stipend for pre and post shift work activities,
    - an increase in shift differential

- an increase in uniform allowance and dry cleaning
- an increase in base pay via a member paid retirement formula
- recruitment incentives
- an increase in health, dental, and vision benefits

If so, what shall the remedy be?

If not, does the Arbitrator have the authority to award monies that have not been previously appropriated by the Legislature to fund these items of compensation?[1]

## Relevant Contract Language

**AGREEMENT BETWEEN THE CALIFORNIA CORRECTIONAL PEACE OFFICER ASSOCIATION AND THE STATE OF CALIFORNIA REGARDING THE AMENDMENT OF THE BARGAINING UNITS 6 MEMORANDUM OF UNDERSTANDING JULY 1, 2001 THROUGH JULY 2, 2006**

**CONTINUOUS APPROPRIATION**

The State agrees to recommend to the Legislature that the following be included in the ratification of the Addendum:

It is hereby appropriated from all appropriate fund sources, the amount necessary to satisfy the economic terms for employee compensation for employees included in the State Bargaining Unit 6, for the term of the Unit 6 Memorandum of Understanding which expires July 2, 2006 as modified by this Addendum dated June 30, 2004.

None of the salary concessions contained in this agreement will become effective unless this addendum is ratified in legislation containing continuous appropriate for the balance of the agreement.

[1] The State submitted the issue in this form, without objection by the Union.

**3. Tie Back July 1, 2006**

The State and the California Correctional Peace Officers Association agree that the Law Enforcement Methodology agreement dated 12/12/01 establishing a total compensation difference between units 5 and 6 of $666 is hereby suspended for the term of this amendment for the purposes of total compensation decreases only. The Law Enforcement Methodology agreement will be reestablished in full on July 1, 2006. The State and CCPOA agree that the samples used in this Law Enforcement Methodology agreement are not all inclusive of total compensation.

## Article VI
## Grievance and Arbitration Procedure

**6.02 Definitions**

A. A "contract grievance" is a dispute between CCPOA and the State, or a dispute of one (1) or more employees against the State, involving the interpretation, application or enforcement of the provisions of this MOU.

B. A "policy grievance" (a non-arbitrable grievance) is a dispute between one (1) or more employees against the State, or a dispute between CCPOA and the State involving subjects not covered by this Agreement and not under the jurisdiction of the State Personnel Board. A policy grievance may be processed only to the Director's level of this grievance procedure unless otherwise capped at a lower level in this agreement (e.g., LOIs/WIDs), and is not arbitrable.

## Article XV
## Salaries

**15.01 Salaries**

**A. General Salary Increase**

In order to recruit and retain highly qualified employees, Unit 6 employees will receive, during the term of this agreement, salary increases in total compensation on specific dates and based on a law enforcement comparative methodology

mutually agreed to by the parties. The specific dates of the salary increases shall be July 1, 2003; July 1, 2004, July 1, 2005; and July 1, 2006.

## Facts

During contract negotiations in 2001, CCPOA and DPA agreed to an "Unpublished Side Letter" containing the "law enforcement comparative methodology" upon which the increases in Section 15.01(A) of the July 1, 2001 through July 2, 2006 Memorandum of Understanding ("MOU") would be based.[2] The MOU specifies four dates for salary increases. The Law Enforcement Methodology[3] relies on the relationship between total compensation received by members of the California Highway Patrol (CAHP) in Bargaining Unit 5, and the total compensation received by CCPOA represented employees in Bargaining Unit 6, as it existed on June 30, 2001. In the "Unpublished Side Letter," the parties agree: "the pre-existing relationship to be maintained as a result of Section 15.01(A) is a total compensation package for Unit 6 which is $666.00 less than the total compensation package received by Unit 5." (J-5, p.3)

In June 2004, the CCPOA and the State negotiated an Amendment to the MOU, incorporating a new pay schedule "In lieu of the scheduled pay raises under the law enforcement methodology." (J-5) The parties agreed to defer portions of the 10.9% increase due Unit 6 members on July 1, 2004. They agreed on July 1, 2005, there would be a "general salary increase equivalent to that provided by the Law Enforcement Methodology, but not less than 5%." They further agreed: "The Law Enforcement Methodology agreement will be reestablished in full on July 1, 2006." Whether the State correctly calculated the July 1, 2006 increase, in

[2] This document was not separately introduced in this hearing, but is part of J-5 and J-7.
[3] The parties appear to use the terms interchangeably.

accordance with the Law Enforcement Methodology, was decided in another arbitration. (J-7) Arbitrator Cohn's Award required the State to add certain items to its calculation of the July 1, 2006 increase. (J-7) The parties later agreed on what was "fair and equitable" to implement the Award. (J-8, p.2)

In 2006, CAHP negotiated a new MOU, containing a variety of immediate and prospective increases, some of which became effective on July 3, 2006, the day after the CCPOA MOU expired. (J-1, Section 27.03(A)) On September 27, 2006, CCPOA filed a fourth level grievance asserting that certain "CAHP monetary benefits must be included in the Bargaining Unit 6 Law Enforcement Methodology in order to maintain the $666 separation."[4] These monetary items, it argues, must be used to immediately re-calculate CCPOA pay.[5]

## Discussion

CCPOA makes four arguments to support its position that the increases in CAHP total compensation that took effect July 2, 2006, must be included in an immediate re-calculation of Unit 6 pay, to preserve the $666 differential with Unit 5. First, it argues the Amendment to the 2001-2006 MOU (J-5) "contains the more significant text over Joint 1." (Tr. 508:12-13) That is, by agreeing the Law Enforcement Methodology would "be reestablished in full on July 1, 2006," the State added a new provision to Section 15.01(A). It agreed salary increases were not limited to those required on the dates listed in that section. Rather, the State agreed to increase Unit 6 salaries whenever CAHP received any benefit that

[4] It appears the CAHP MOU had not yet been ratified at the time of the grievance, although it has been subsequently. (J-11)

[5] The specific items are set out in the "Issue." CCPOA withdrew "retirement incentive" as a monetary item to be included in the salary calculation on the first day of the hearing. (Tr. 66:12-16) Furthermore, CCPOA conceded "member paid retirement formula" was not ripe for consideration. (Tr. 515:20-25)

increased its total compensation, so as to continually maintain the $666 differential in total compensation.[6] While the current MOU has expired, the Law Enforcement Methodology requires continual increases until the parties negotiate a new agreement or the State imposes its last, best offer.

Second, CCPOA argues that the arbitrator is limited to interpreting the MOU and is not authorized to decide this grievance based on any statutory grounds contained in the Ralph Dills Act. If the State wants to argue the Act applies, it can do so in court.

Third, the fact the legislature has not passed an appropriation to fund the increases required by the Law Enforcement Methodology is not determinative. The Cohn Award "clearly establishes the principle" CCPOA is entitled to benefits when CAHP gets them. The Cohn Award has *res judicata* effect in this proceeding, barring the State from re-arguing the matter of whether there must be legislative approval for raises required by the Law Enforcement Methodology.

Fourth, CCPOA argues, in addition to any entitlement under the Law Enforcement Methodology, Unit 6 members are entitled to an increase in the State's payment for health insurance under the 85/80 formula awarded them by Arbitrator Cohn. That is, the formula itself represents the status quo under the expired MOU. Since that is the case, the State must continue to fund the health insurance benefit in accordance with that formula.

The State makes five arguments to support its assertion the grievance lacks merit. First, it argues the plain language of Section 15.01(A) controls and the State met all of its obligations under that section. The section provides that Unit 6

[6] This is not limited to bargained for increases, since there is a statutory salary setting mechanism for CAHP.

members will receive "salary increases in total compensation on specific dates." It lists four specific dates. There is no allegation the State failed to provide a salary increase on any one of those dates. Rather, CCPOA is asking the arbitrator to add additional dates for increases. According to the State, the arbitrator has no such authority. The MOU, at Section 6.12(E), says the arbitrator "has no authority to add to, delete, or alter any provisions of the MOU.

Second, the 2004 Amendment neither created ongoing increases, nor binds the State to any salary increases beyond those previously agreed to under Section 15.01(A). These are sophisticated parties, the State argues, and they could have added some language to create a continuous State obligation to give increases after July 1, 2006. But they did not. Indeed, CCPOA provided no bargaining history evidence to suggest the parties had any such intention when they negotiated the 2004 Amendment. Rather, they "reestablished" the relationship with CAHP on July 1, 2006, the date of the last raise in the MOU. The State met all of its obligations for salary increases under the MOU when it provided an increase, in accordance with the Law Enforcement Methodology, on July 1, 2006.

Third, the State argues, to interpret the MOU as CCPOA proposes would render the contract absurd. It would result in automatic increases, without any collective bargaining, into the indefinite future. Fourth, the State argues that none of the CAHP increases in compensation occurred during the term of the MOU. They all began, at the earliest, July 3, 2006. Thus, there was no requirement to consider them when computing the July 1, 2006 salary increase.

Fourth, the State argues that CCPOA got all it was entitled to when it got the financial benefit of the 85/80 medical plan as of July 1, 2006. It is not entitled to any additional money because CAHP members' benefits increased, in

accordance with the 85/80 formula in their contract, when health care costs went up on January 1, 2007. Arbitrator Cohn simply awarded CCPOA the increase in CAHP benefits that occurred before July 1, 2006. His Award does not entitle them to benefits increases that occur after July 1, 2006.

Fifth, the State argues it would violate public policy, specifically Government Code §3517.61, for the arbitrator to grant a salary increase that has not been approved by the legislature. It cites a recent case (currently on appeal) in which an arbitrator determined a limitation in the MOU was "scrivener's error" and awarded CCPOA a benefit beyond the limitation. The Court of Appeals decided a court must vacate an Award that violates GC §3517.61 by requiring the expenditure of funds not approved by the legislature. In this case, the testimony is that the legislature has not appropriated money to pay for additional salary increase to CCPOA.

I find there is no requirement in the MOU to provide additional salary increases to CCPOA because of increases in CAHP total compensation after July 2, 2006. I make this finding for four reasons.

First, the plain language of Section 15.01(A) demands this finding. Section 15.01(A) requires "salary increases in total compensation on specific dates." It lists four specific dates. There is no ambiguity in the language. The State paid those increases on those dates, except to the extent the parties agreed to defer payments in their 2004 Amendment. The MOU has now expired. There is no language in the expired MOU that requires any further salary increases. Thus, none are required, unless and until the parties negotiate new increases.

Second, the Law Enforcement Methodology, by its terms, does not require the State to pay any salary increases. The Law Enforcement Methodology is just

that: a methodology. It tells the parties how to compute the "salary increases in total compensation" required on the specific dates in Section 15.01(A).[7] It does not, by its own language, require any salary increase in total compensation" at any time.[8]

Third, there is no evidence to support CCPOA's assertion the "reestablishment" of the Law Enforcement Methodology created an obligation for the State to provide continual salary increases after paying the increases required on the four dates specified in Section 15.01(A). There is no bargaining history evidence to suggest this was the intent of the parties. In the absence of any such bargaining history, one must interpret the term "reestablishment" in its ordinary sense. In the 2004 Amendment, CCPOA agreed to defer part of the salary increase due on July 1, 2005, calculated using the Law Enforcement Methodology. It temporarily relinquished the relationship between CCPOA and CAHP total compensation it had established in the 2001-2006 MOU. By re-establishing the Law Enforcement Methodology on the day of the last salary increase required by the MOU, CCPOA insured its members the "going out" rate it initially negotiated. While Unit 6 members gave up money by virtue of the deferral, at the end of the MOU they were in the same total compensation relationship with CAHP as they had originally bargained. [9]

---

[7] Whether the Law Enforcement Methodology covers specific changes to CAHP compensation is contested. Since I find the expired MOU requires no further salary increases, I need not speculate on the issue.

[8] CCPOA is correct in asserting the Law Enforcement Methodology is the status quo from which the current bargaining proceeds. But that means only that until the parties agree to change it, or the State imposes a new agreement after impasse, the Law Enforcement Methodology is the method by which the State will calculate any new "salary increases in total compensation" it negotiates.

[9] In light of my determination on the underlying question, I have not considered CCPOA's arguments for including all of the specific elements of the CAHP package in the Law Enforcement Methodology, or the State's rebuttals to these arguments.

CCPOA argues that it is entitled to an increase in the amount the State pays for health insurance, since the cost of health insurance increased on January 1, 2007. This argument relies on two assertions that are independent of its overall argument relying on the Law Enforcement Methodology.[10] First, CCPOA asserts that Arbitrator Cohn awarded it the 85/80 formula as part of the "salary increases in total compensation" it was due as of July 1, 2006. Second, CCPOA argues the State must increase its current payments for health insurance, to maintain the 85/80 formula Arbitrator Cohn awarded, in light of the increase in health insurance costs that occurred on January 1, 2007. There are difficulties with each of these assertions.

First, the evidence shows Arbitrator Cohn awarded CCPOA money because the State failed to account for the increased health care contributions CAHP negotiated when it calculated the salary increase due July 1, 2006. In his Award he said:

> … the State will cost out and set a dollar amount (value) of the health contribution (the 85/80-80/80 differential) retroactive to January 1, 2006, the date the contribution took effect in Unit 5. The State shall also cost out and set a dollar amount on the so-called holiday-in-lieu issue (the 64 extra leave hours). The State will then recalculate the Unit 5/Unit 6 charted compensation, establish the $666 TC differential and set out revised increases, if any, based on the top step rate for Unit 5 and 6 employees. (J-7, 51:23-52:1)

The "Arbitrator's Supplemental Opinion and Award," signed January 18, 2007, appears to be an agreement reached by the parties. In its first paragraph it says: "the parties submit the following matters are fair and equitable with respect

[10] I previously determined the Law Enforcement Methodology does not provide any independent basis for increases after the July 1, 2006 increase required by the MOU.

to all members of Bargaining Unit 6." The Supplemental Award gives Unit 6 employees a specific lump sum payment as:

> …full and complete resolution of all retroactive claims for any type of pay, overtime, POFFII, health benefits, or any other payment resulting from the resolution of these grievances from July 1, 2005, through December 31, 2006. (J-8, p.3, ¶b)

It also gives employees:

> an increase to the employer medical contribution equal to the 2006 85/80 rates effective January 1, 2006. For the period of January 1, 2006 through December 31, 2006, retroactive payments will be issued as specified below. Effective with the January 2007 pay period, the following reflects the employers' total contribution (2006 rates) for employees enrolled in a health benefit plan.
> "self" ($321)
> "self plus 1" ($625)
> "self plus 2 or more" ($807) (J-8, p.2)

The 2007 health care rates were in effect when the parties agreed to have Arbitrator Cohn issue this Supplemental Award. Nevertheless, the Supplemental Award calls for the State to pay specific monthly amounts, beginning January 2007, based on an 85/80 formula applied to 2006 rates. Thus, despite finding the State was obliged to recalculate the July 1, 2006 salary increase and make retroactive payments, Arbitrator Cohn's Supplemental Award did not award a formula to CCPOA. Instead, it required the State to contribute specific amounts for Unit 6 members' health care, beginning January 2007. Thus, it is not clear that the Supplemental Award gave CCPOA the CAHP 85/80 formula, as CCPOA argues.

Assuming it did, there is still no basis for increasing the State's health care contributions for Unit 6 members. There are two reasons no increase is required.

First, the parties have arbitrated the specific issue of the health care contributions Unit 6 members are entitled to beginning January 2007. The Supplemental Award, made at the time the 2007 health care costs were in effect, specifies that entitlement.[11] No change in the expired MOU, or health care rates, has occurred since the Supplemental Award. Applying *res judicata*, the Cohn Supplemental Award finally decided the amount of the employer health care contribution beginning in January 2007. There is no basis for re-deciding the issue.

Second, even if one assumes the Supplemental Award added a term to the MOU, requiring the 85/80 formula, the MOU expired well before the 2007 increase went into effect. The MOU cannot be the source of any requirement to increase health contributions to reflect the 85/80 formula. An increase may be required by the statutory status quo obligation. CCPOA has argued, however, that my authority is limited to interpreting the contract. If a party claims a wholly statutory right it must go to court. That is true. Even if the Cohn Supplemental Award introduced a new contract term subject to the statutory status quo obligation, that obligation does not exist in the MOU, but in statute. Consequently, I have no authority to enforce it.

There is no basis in the MOU for awarding CCPOA any of the benefits at issue in this arbitration. Since it is unnecessary to decide the preliminary statutory issues to completely resolve the underlying grievance, I decline to do so. If there are any remaining issues relating to the State's statutory status quo obligation, they are for a court to decide.

[11] I note the 2007 rates were in effect when the parties agreed to the Supplemental Award, since CCPOA has argued the "change" in health care rates beginning January 1, 2007, triggered the State's obligation to increase its contribution in accordance with the 85/80 formula, based on "new"2007 rates.

By reason of the foregoing, I make the following:

## Award

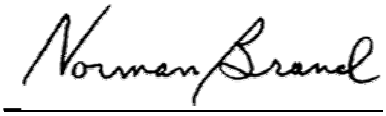
1. **In light of my determination on the underlying contract issues, it is unnecessary for me to interpret or apply the provisions of the Ralph C. Dills Act, Government Code sections 3517.61, 3517.7, and 3517.8. Consequently, I offer no opinion on my ability to do so in this case.**

2. **In light of my determination on the underlying contract issues, and the State's willingness to proceed on the merits, it is unnecessary to consider whether the provisions of the Dills Act serve to prevent this arbitration from proceeding, because the Legislature did not appropriate any monies for a wage increase and/or new benefits for Unit 6 members during the 2006-07 fiscal year. Consequently, I offer no opinion on the question.**

3. **All of CCPOA's claims for economic compensation are not ripe for adjudication. Consequently, I have not considered whether an increase in CAHP base pay, via a member paid retirement formula, has any effect on CCPOA wages.**

4. **The California Department of Corrections and Rehabilitation did not violate Section 15.01(A) or 27.01 of the expired Bargaining Unit 6 MOU when it failed to provide Unit 6 members with:**
    a. **a 3.5% salary stipend for pre and post shift work activities,**
    b. **an increase in shift differential,**
    c. **an increase in uniform allowance and dry cleaning,**
    d. **an increase in health, dental, and vision benefits.**

5. **The grievance is denied.**



**San Francisco, CA**

**September 1, 2007**

**Norman Brand**